No. 17-1026

In the Supreme Court of the United States

GILBERTO GARZA, JR.,

Petitioner,

v.

IDAHO,

Respondent.

On Writ of Certiorari to the Supreme Court of Idaho

BRIEF FOR LOUISIANA, ALABAMA, ARIZONA, ARKANSAS, INDIANA, KANSAS, NEBRASKA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, UTAH, WISCONSIN, AND WYOMING AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE

The undersigned Attorneys General are the chief legal officers of our respective States. We prosecute crimes and often enter into plea agreements that benefit not only the State, but also victims, the defendant, and the criminal justice system. Our perspective will therefore aid the Court in understanding the potential consequences of the per se rule sought by Petitioner.

Waivers of the right to appeal contained in plea agreements have become increasingly important to the criminal justice system. Appeal waivers ensure finality for victim and defendant and avert the cost and time spent on a long, drawn out, and often meritless appeals process. They are a valid and important component of plea agreements.

Although Petitioner focuses on the prejudice prong of the *Strickland v. Washington* ineffective-assistance-of-counsel test, a logical predicate question is whether counsel performs deficiently when, as in this case, he declines his client's request to file an appeal on an issue plainly covered by an appeal waiver. Should the Court hold that an attorney *must* appeal an explicitly waived issue at his client's request or be found to have rendered deficient performance, it would effectively create a "right" for a defendant to sandbag the system by negotiating a plea deal and then ignoring it. This would remove any incentive for prosecutors to offer defendants reduced sentences and charges or other benefits in exchange for appeal waivers. The *Amici* States have an interest in protecting the integrity of the negotiated bargain, in retaining appeal waivers as

meaningful bargaining chips for defendants, and in giving victims the finality appeal waivers afford.

SUMMARY OF ARGUMENT

A defendant has no right to breach any term of an informed negotiated plea agreement that was voluntarily entered. That includes his autonomously negotiated promise not to appeal. Thus, where an attorney refuses to breach the agreement by filing an appeal on an issue plainly covered by the agreement, he honors and protects his client's decision and explicit prior instruction to him to enter into the agreement in exchange for substantial benefits. Upon waiving his right to file an appeal, under state law an appellate proceeding is no longer available to him. Thus, he is not prejudiced by "losing" a proceeding to which he has no right. Nor is it fundamentally unfair to him to have to, at least, show that his appeal waiver was not valid—something of which he has personal knowledge. We turn first to a predicate issue, then address performance, prejudice, and fairness.

A. Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant asserting an ineffective-assistance-of-counsel claim must show his counsel performed deficiently and the deficient performance prejudiced him. Citing *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), Petitioner conflates these two requirements into the sole issue of prejudice. But neither *Flores-Ortega* nor the two other cases upon which Petitioner relies addressed whether counsel performs deficiently when denying a defendant's request to appeal an issue plainly within the scope of a plea agreement's appeal waiver. We therefore first turn to that predicate issue.

B. Counsel does not perform deficiently when he honors the defendant's autonomous decision to enter into a plea agreement containing an appeal waiver and declines the defendant's later request to appeal an issue within the waiver's scope. Plea agreements are enforceable contracts and defendants alone have the protected right to determine the terms. At the state level, most such agreements do not contain a waiver of the right to file an appeal. Where they do, however, the right is forfeited in exchange for additional benefits such as substantial reductions in sentencing and charging, as in this case. As with any contract, especially one where constitutional rights are being waived, the defendant must enter into it voluntarily and be adequately informed of its risks and benefits. But once that is assured, and the defendant agrees to the provision, *the right is gone*—as an exercise of the defendant's autonomy.

A defendant does not have a "right" to breach a valid plea agreement any more than he has the right to reverse his waiver of other constitutional rights. For example, a defendant cannot waive his right to remain silent, testify, and then "re-invoke" the right to avoid cross-examination. In the same manner, Petitioner cannot retain the benefits of the plea agreement while appealing in the hopes of reducing his agreed-to sentence. The prosecutor, judge, and victim have relied on his promises. And the prosecutor is also strictly held to the terms of the agreement.

It is therefore reasonable for counsel to refuse to assist a defendant in breaching his contractual, autonomously made, promise not to appeal. Absent an appeal waiver, counsel might do no harm filing a

fruitless appeal. But where a defendant agreed to an appeal waiver, filing an appeal carries additional consequences as it could void the agreement, leading to the reinstitution of charges. Here, that could have led to two life sentences rather than the approximately ten years he received under the plea agreement. Absent a defendant's request to withdraw from the plea agreement entirely (and Petitioner made no such request), counsel acts properly when he refuses to risk that outcome.

C. *Flores-Ortega* found that a defendant was presumptively prejudiced by the denial of a judicial proceeding that he wanted and to which he had a *right*. Petitioner here only *wanted* access to an appellate proceeding to change his sentence—but he had no *right* to one. The right to an appeal is a state statutory creation; thus, states are entitled to establish the procedures for appealing lower court judgments. When a defendant waives his appellate rights, he should not be heard before an appellate court.

Petitioner knowingly and intelligently waived his right to appeal in exchange for substantial negotiated benefits. Contrary to Petitioner's contention, it is not "unfair" to require defendants to show on a case-by-case basis that they were prejudiced by counsel's refusal to appeal a waived issue. It is not unfair to require a defendant to abide by his promise or show why the appeal waiver is not valid. Defendants are not the only ones who suffer the consequences of breaching their plea agreements—the state and the victim are denied the finality they were promised in exchange for the plea agreement.

Petitioner focuses on the few issues that survive appeal waivers, such as arguments that a defendant did not enter the plea agreement voluntarily or that his counsel performed ineffectively during the plea process. But he never asked his counsel to pursue those claims. More generally, it is not unfair for states to channel them to their post-conviction review process. As the Court has recognized, both of those issues are better reviewed in post-conviction proceedings, where the facts outside of the record can be explored. Furthermore, defendants have other (non-appellate) options, some of which a defendant is required to pursue before an appellate court has jurisdiction. Petitioner could have filed a motion to modify his sentence under Idaho Criminal Rule 35. Or, if he felt his plea was involuntary, he could have moved to withdraw his plea. He chose not to pursue either course, presumably because he did not want to undo the excellent bargain he made.

D. Appeal waivers benefit multiple parties. They guarantee finality, are offered in exchange for reduced sentences, and increase the likelihood that courts will approve a plea agreement. Should the Court accept Petitioner's argument, it would create a new "right" to breach promises made in a plea agreement and would damage the integrity of the plea-bargaining process. If a prosecutor cannot promise the finality that such a waiver provides, defendants will receive longer sentences, more cases will go to trial, and victims will have to wait longer to receive finality.

The judgment below should be affirmed.

ARGUMENT

I. TO PROVE INEFFECTIVE ASSISTANCE OF COUNSEL, A DEFENDANT MUST PROVE A VIOLATION OF *BOTH* PRONGS OF THE *STRICKLAND V. WASHINGTON* TEST.

In *Roe v. Flores-Ortega*, this Court explicitly held that *both* prongs of the two-part test set forth in *Strickland v. Washington* apply to claims "that counsel was constitutionally ineffective for failing to file a notice of appeal." 528 U.S. 470, 477 (2000). Petitioner appears to conflate the two requirements (deficient performance and prejudice) into the *sole* issue of prejudice.

Before prejudice can be examined, however, the predicate question must be answered: Did counsel's representation fall below an objective standard of reasonableness? Petitioner appears to simply assume counsel's conduct was per se deficient based on *Flores-Ortega*'s statement that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Pet'r's Br. 12 (quoting *Flores-Ortega*, 528 U.S. at 477) (additional citations omitted)). But *Flores-Ortega* did not involve an initial decision to waive the right to appeal and specifically rejected any "per se rule" providing that counsel "must file a notice of appeal [in all cases]." 528 U.S. at 478. Such a per se rule, stated the Court, was "inconsistent with *Strickland's* holding that 'the performance inquiry must be whether counsel's assistance was reasonable considering all of the circumstances.'" *Id.* (citing *Strickland*, 466 U.S. at 688). The Court noted that, under that test, "courts must 'judge the reasonableness

of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'" *Id.* at 477.

Flores-Ortega further noted that the Court has held that "a defendant who explicitly tells his attorney not to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently." *Id.* (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). That is precisely what a defendant such as Petitioner does when he signs a plea agreement containing an appeal waiver. A defendant in such a case gives his attorney conflicting instructions. Nothing in *Flores-Ortega* resolved how counsel's performance should be assessed in that situation.

The two cases cited by *Flores-Ortega* and upon which Petitioner also relies are equally off-point. Pet'r's Br. 12. *Rodriguez v. United States* involved counsel who did not file a notice of appeal after a trial, not a plea agreement. 395 U.S. 327, 328 (1969). And in *Peguero v. United States*, the issue was whether the trial court erred by failing to inform the defendant of his right to appeal as required by a federal statute. 526 U.S. 23, 25 (1999). The Court held that it was not necessary where the defendant already knew of the right. *Id.* Although the defendant contended his counsel was ineffective in not filing an appeal, the Court denied that claim because the district court had found the defendant told his attorney not to file an appeal. *Id.*

II. HONORING A CLIENT'S INITIAL AUTONOMOUS DECISION IS NOT DEFICIENT PERFORMANCE UNDER *STRICKLAND*.

Where a defense counsel negotiates a beneficial deal with the prosecutor on behalf of his client, and the client specifically tells him to accept the plea agreement—including its appeal waiver—he has done all that a reasonable defense attorney can do to render competent and efficient counsel. Defense counsel does not perform deficiently when he refuses his client's later request to appeal an issue clearly covered by the waiver. As the Ninth Circuit observed, this would be a "particularly plain instance of where 'ineffective assistance of counsel' is a term of art that does not mean incompetence of counsel," *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1199 (9th Cir. 2004), and would be baffling. Whatever counsel's obligation may be regarding issues *outside* the scope of the waiver, he is not obligated to blindly follow the defendant's request to breach the agreement to pursue a futile (because waived) appeal where the defendant did not say he wanted to withdraw from the plea agreement and lose its benefits.

Although the defendant in *Flores-Ortega* had not signed an appeal waiver, the Court emphasized such waivers matter. It stated that whether the defendant had entered into a plea agreement that "expressly waived some or all appeal rights" was a "highly relevant factor" that must be considered as part of the totality of circumstances review. *Id.* at 480. The concurring Justices went further, finding counsel might not even have a duty to consult with his client about appealing if the plea agreement included an appeal

waiver. *Id.* at 489 n.1 (Souter, J., concurring). Thus, the Court acknowledged that plea agreements with appeal waivers are not the same as other plea agreements and that evaluation of counsel's performance differs between them.

Notwithstanding this Court's caution, eight circuits have created another bright-line rule for cases involving appeal waivers. Ignoring the plain difference, these circuits have held that an attorney is per se ineffective for not filing an appeal when the client tells him to do so even though the client previously told counsel, the prosecutor, and the trial court that he did not want to file an appeal. As the Ninth Circuit said, "[t]his result is troubling." *Sandoval-Lopez*, 409 F.3d at 1197.

A. The Inclusion of an Appeal Waiver in a Plea Agreement Has Legal Significance.

1. A plea agreement constitutes a legally binding contract, and the parties bargain for provisions waiving appeal.

Plea agreements are considered contracts with constitutional dimensions, *Ricketts v. Adamson*, 483 U.S. 1, 16 (1987) (Brennan, J., dissenting), to which the common law of contracts apply. *Puckett v. United States*, 556 U.S. 129, 137 (2009).[1] Nearly fifty years ago, this Court approved plea agreements as a method

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[1] *See also United States v. Norris*, 486 F.3d 1045, 1048–49 (8th Cir. 2007); *United States v. Novosel*, 481 F.3d 1288, 1293–94 (10th Cir. 2007); *United States v. Wood*, 378 F.3d 342, 348–50 (4th Cir. 2004); *United States v. Ready*, 82 F.3d 551, 558–59 (2d Cir. 1996); *Kingsley v. United States*, 968 F.2d 109, 115 (1st Cir. 1992).

of resolving criminal cases. *See Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970). Plea bargaining has become an essential component of the administration of justice. Properly administered, this Court has encouraged its use for many reasons. *Santobello v. New York*, 404 U.S. 257, 260–61 (1971). For a defendant who sees slight possibility of acquittal, limiting the probable penalty has clear advantages. *Brady*, 397 U.S. at 752. And the agreement provides finality, safety, and efficient use of judicial resources to the prosecution, public, and justice system. *Santobello*, 404 U.S. at 260–61.

The addition of an appeal waiver also has value. Research has revealed that "the government appears to provide some sentencing concessions more frequently to defendants who sign waivers than to [those] who do not." Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L. J. 209, 209–10, 232–42 (2005) (hereinafter "*Appeal Waivers*"). The research also shows that judges are more likely to accept sentencing stipulations and downward departures when an agreement includes a waiver. *Id.* at 235.

By simply entering a plea of guilty, the defendant waives many important constitutional rights. *Class v. United States*, 138 S. Ct. 798, 805 (2018). A guilty plea mostly waives trial rights, but the defendant also waives his right to assert claims inconsistent with his plea, such as asserting he did not commit the offense. *Id.* at 803–05.

2. A defendant exercises his right to "autonomy" when he chooses to waive his right to appeal in exchange for substantial benefits.

Because a state appeal right is not typically waived as part of the average plea deal, the right remains as an additional "bargaining chip."[2] And this Court has recently affirmed that it is "the defendant's prerogative, not his counsel's, to decide on the objectives of his defense," *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505 (2018), including the choice to end the litigation by accepting a plea offer. Though he has the "ultimate authority to make the fundamental decision whether to take an appeal," *Flores-Ortega*, 528 U.S. at 477, he exercises that authority when he chooses to use that additional bargaining chip to gain additional benefits. A defendant who wants these additional concessions must exercise his fundamental right to make the decision about his defense *at the plea agreement stage*.

Admittedly, as with all waivers of rights, an appellate waiver "not only must be voluntary but must be a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748.[3] As an added

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[2] *See Lout v. State*, 111 P.3d 199, 201 (Mont. 2005) (Lout's plea agreement was supported by consideration; Lout validly waived any right to appeal or challenge its terms.).

[3] *McDaniel v. State*, 38 N.E.3d 226 (Ind. Ct. App. 2015) (McDaniel knowingly and voluntarily waived his right to appeal his sentence and the trial court's mistaken advisement at the end of the sentencing hearing did not affect the validity of McDaniel's waiver.).

layer of protection, the trial court must determine that a defendant understands the terms of the agreement he is making and that he is entering into the agreement voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). But once this is done, the bargain—including the waiver of the right to file an appeal—is complete and enforceable and the defendant is bound by his agreement. *United States v. Evans*, 361 Fed. App'x 4, 6–7 (10th Cir. 2010) (citing *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004) (*en banc*)). Once a defendant negotiates away the right to appeal, the right is gone.

An attorney, to be effective, is required only to pursue and protect the *rights* of a client, not his *post hoc* regrets. Thus, where a defendant has forfeited his right to appeal, like here, counsel's performance is not per se deficient in not filing a notice of appeal, even where the client has post-plea regrets and wants to appeal his conviction or sentence. A properly informed defendant "cannot change his mind and later blame his lawyer." *United States v. Hirsch*, 207 F.3d 928, 931 (7th Cir. 2000); *see also United States v. Golden*, 255 Fed. App'x 319, 322 (10th Cir. 2007) ("[W]e cannot say that a lawyer engages in constitutionally deficient or prejudicial practice by declining to file an impermissible notice of appeal . . . . ").

This is particularly true in this case. Petitioner was informed over and over he would serve his three sentences consecutively, but he still exercised his prerogative to waive his right to appeal his sentence. After openly assuring the trial court he understood and accepted these conditions, he quickly turned around and tried to appeal his sentences anyway. When the request to appeal is this specific and the waiver so

explicit, an attorney's performance should not be considered unreasonable, deficient, or ineffective for not filing an appeal that his client was clearly not entitled to file. It is difficult, if not impossible, to find any "autonomy" principle that is violated in this scenario.

After consulting with his attorney,[4] Petitioner knowingly and intelligently bargained away his right to file an appeal of both his conviction and his sentence in exchange for charging and sentencing benefits so advantageous that the trial judge almost did not accept the plea. R. 132. So, unlike an ordinary plea agreement containing no appellate waiver, Petitioner's *right* to appeal his sentence no longer existed. Any arguable autonomy interest remaining is less compelling than the state's interest in maintaining finality for the

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[4] Petitioner has not contended his attorney failed to consult with him. This is probably because, under penalty of perjury, on two separate dates with nearly a month between them (January 22, 2015, and February 20, 2015), Petitioner indicated in at least six different ways that he had fully discussed the agreement he was entering into with his attorney and was satisfied with his attorney's counsel. His attorney also signed the forms acknowledging he had "discussed, in detail, the foregoing questions and answers with my client." R. 100, 112. Furthermore, in his plea agreements, which explicitly included waiver of his right to appeal and to question his sentence, App. 44a, 49a, he initialed paragraphs providing that he had "conferred with learned counsel" and that he was "pleased and satisfied with his legal representation." R. 91, 103. In the plea colloquies and sentencing hearing, the court asked Petitioner's counsel if he fully advised his client of his rights and of the consequences of pleading guilty to which counsel responded affirmatively. R. 124, 128 Furthermore, when asked by the Court, Petitioner admitted under oath that his attorney had told him to his satisfaction about his rights and potential defenses. R. 125,129.

benefit of the victim and the effective administration of justice.

Rather than "wrest" Petitioner's autonomy from him or "usurp" his authority, counsel respected his autonomy and assisted him in achieving his objective—a plea agreement that substantially reduced his sentence from life in prison to a little over ten years and that dismissed numerous charges, state and federal.

B. Neither Party Has a Right to Breach a Plea Agreement.

Petitioner makes the claim, however, that a defendant has an additional autonomy "right" to *breach* this enforceable agreement. Pet'r's Br. 8. No right to breach a plea agreement has ever been recognized and Petitioner cites no authority for such a novel idea. "The paucity of authority on the subject may be explained by the fact that such a notion has never been responsibly advanced." *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) (referring to the lack of a right to use false evidence). In fact, just the opposite is true with many other constitutionally guaranteed rights that defendants waive.

1. In all other areas, defendants are held to their waivers.

Defendants can waive numerous constitutional rights, but an untimely or delayed attempt to revoke or withdraw that waiver is not allowed. For example, a defendant can waive his right to trial by jury, guaranteed by the Sixth Amendment, and choose to be tried by a judge instead. *Adams v. U.S. ex rel McCann*, 317 U.S. 269, 278–81 (1942). But he cannot withdraw

that waiver when it appears a bench trial might not be to his liking, nor can he withdraw it in an untimely manner, or in order to "game the system."[5] Similarly, a defendant should not be able to "game the system" by accepting the benefits of a plea bargain, agreeing to waive his right to an appeal, then withdrawing the waiver after sentencing—at least not in the absence of a motion to withdraw his *entire* plea agreement.

Defendants similarly cannot selectively waive their Fifth Amendment right to remain silent. *See Kansas v. Cheever*, 134 S. Ct. 596, 601 (2013); *Jenkins v. Anderson*, 447 U.S. 231, 236 n.3 (1980) ("[W]hen a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination."); *Brown v. United States*, 356 U.S. 148, 156 (1958). As the Court said in *Brown*, "[t]he interests of the other party and regard for the function of courts of justice . . . prevail in the balance of considerations." 356 U.S. at 156. A defendant should likewise not be able to selectively retain the benefits of a plea in which he has waived his right to an appeal, then be permitted to

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[5] *See, e.g.*, *Mojica v. State*, 437 S.E.2d 806, 807 (Ga. 1993) (explaining withdrawal must be made in such a fashion so as not to delay the trial or impede the cause of justice); *People v. Spencer*, 513 N.E.2d 514, 516 (Ga. 4th Dist. 1987) (A criminal defendant may not waive a jury, hoping to rely upon a nonexistent weakness in the charge and later retract that waiver.); *see also United States v. Satterwhite*, 893 F.3d 352, 358 (6th Cir. 2018); *United States v. Solorzano-Rivera*, 368 F.3d 1073, 1078 (9th Cir. 2004) ("Defendant would be able to 'game the system' by reacting favorably to a government's plea offer, waive indictment on lesser charges, and then after reneging on his part of the bargain, complain that the government failed to obtain an indictment within the appropriate time frame." (internal citations omitted)).

selectively breach a portion—the appeal waiver—*after* sentencing when he has buyer's remorse.

If a defendant wants to withdraw from his plea agreement altogether, state and federal law provide for those procedures.[6] But that is not what Petitioner asked his counsel to do. He instead told his counsel to ask an appeals court to reduce his sentence—and nothing else. No defendant is entitled to that relief. If a defendant chooses to breach a plea agreement (*e.g.*, by appealing a waived issue), the breach will cause him to lose the benefits of the bargain and put him back in his original position, ready to be tried and sentenced. He may be exposed to more charges, greater penalties, or both. *See, e.g., Ricketts v. Adamson*, 483 U.S. 1, 10 (1987) (defendant who breached agreement by refusing to testify against another person could be retried and sentenced to death).

Thus, defendants have no "right" to breach their agreements or revoke their waivers. No right is absolute; there are limitations on each one. In fact, self-representation, the original right at issue in the first

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[6] *See, e.g.*, 16A Ariz. R. Crim. Proc. 17.5, Ark. R. Crim. Proc. 26.1, Conn. Practice Book § 39-26, Conn. Practice Book 1998, § 39-27, Cal. Penal Code § 1192.5 (West), Ga. Code Ann. § 17-7-93, Ga. Uniform Sup. Court R. 33.12, Ind. C. 35-35-1-4, Kan. Stat. Ann. § 22-3210 (West); Ky. R. Crim. Proc. 8.10, La. Code Crim. Proc. art. 559, Md. R. 4-242; 49 Minn. S.A. R. Crim. Proc. 15.05, N.J. Ct. R. 3:21-1, 8 G. C. A. § 120.42, SDCL § 33-10-136, SDCL § 23A-27-11, Pa. C. C. R. Crim. P. No. 591, MI Rules MCR 6.310, N.J. R. 3:9-3(e), O.R.S. § 135.365, Nev. R. S. 176.165, Oh. Crim. R.32.1, 22 Ok. St. Ann. § 517, Pa. R. Crim. P. 591, Tenn. R. Crim. P. 32(f); Ut. C. A. 1953 § 77-13-6, Ut. R. Juv. P. 25A, U. C. A. 1953 § 39-6-38, Va. Code Ann. § 19.2-296, N.Y.C.P.L. § 220.60(3), Wisc. S.A. 971.08; Fed. R. Crim. P. 11(d) (withdrawal timing) & (e) (finality).

case to speak of "autonomy," *Faretta v. California*, 422 U.S. 806 (1975), has been restricted in numerous situations. *See Indiana v. Edwards*, 554 U.S. 164 (2008) (explaining states can insist on representation by counsel for those competent enough to stand trial but who suffer from severe mental illness); *Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 154 (2000) (no right to self-representation on appeal); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (*pro se* defendant's Sixth Amendment right to conduct his own defense was not violated by unsolicited participation of standby counsel).

2. Prosecutors are not allowed to breach the terms of a plea agreement.

The obligation to abide by plea agreement terms is a two-way street. As this Court has recognized, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). Prosecutors are not only prohibited from explicitly repudiating the government's assurances, they may not engage in "end-runs around them." *United States v. Rivera-Rodriquez*, 489 F.3d 48, 57 (1st Cir. 2007). Adherence to the terms of a plea agreement requires more than "lip service" on a prosecutor's part. *Id.* A defendant is entitled not only to the government's 'technical compliance' with its stipulations but also to the 'benefit of the bargain' struck in the plea deal, and to the good faith of the prosecutor." *United States v. Matos-Quinones*, 456 F.3d

14, 24 (1st Cir. 2006) (quoting *United States v. Clark*, 55 F.3d 9, 11 (1st Cir. 1995)).

A defendant should no more be allowed to make an "end-run" around or "pay lip service to" his agreement than a prosecutor.

3. Defendant is not the only person harmed by his decision to breach a plea agreement.

Petitioner argues he has a "right" to decide whether to breach his plea agreement because he is the one who has to "tolerate the consequences." Pet'r's Br. 25–26. But he *isn't*. A plea agreement also benefits the criminal justice system and, often, the victim of the crime has to "tolerate the consequences." A breach of the appeal waiver could also upset a coextensive deal with other co-defendants. A prosecutor negotiating an appeal waiver is often motivated by the need to ensure the victim's safety, to avoid putting victims through the crucible of trial, to obtain restitution, in some tragic cases to *locate* a deceased victim, and to put an end to the litigation so that the victims or their families can move on with life.

Over the last twenty years, the victim's right to be involved in the criminal case has been recognized and protected by the citizens of nearly every state, as well as the federal government.[7] Victims' rights acts provide

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[7] *See, e.g.*, Crime Victim's Rights Act (CVRA), 18 U.S.C. § 3771. The citizens of thirty-four states have overwhelmingly approved constitutional protections for victims in their states. For details about the constitutional amendments in each of these states see the National Victims' Constitutional Amendment Passage, www.nvcap.org/states/stvras.html.

that victims have the right to consult with the prosecutor, to be represented by counsel, to be reasonably heard at plea and sentencing hearings, to receive restitution, and to be informed of any plea bargain. A victim may even move the court to re-open a plea or sentence if either her right to be heard was denied or if the accused did not plead to the highest offense charged. This Court has also recognized that these statutes give victims a stake in a criminal proceeding. *See, e.g.*, *Paroline v. United States*, 572 U.S. 434, 439 (2014); *Dolan v. United States*, 560 U.S. 605, 607-08 (2010); *Hughey v. United States*, 495 U.S. 411, 421 (1990); Md. Code Crim. Proc. § 11-103 (West) (victim right to appeal); *see also State v. Barrett*, 255 P.3d 472, 481–82 (Or. 2011) (sentence vacated because victim denied right to be heard at sentencing); *State v. Casey*, 44 P.3d 756, 765–66 (Ut. 2002) (court acted properly by "informally" reopening plea agreement acceptance hearing to permit crime victim's opposition to plea).

Petitioner's argument that, "like any party to a contract," he alone has the right to decide whether he is willing to breach an appeal waiver because he alone "bears the personal consequences" of that decision is quite false. Pet'r's Br. 25–26. Whether the victim has been involved in the negotiation of the plea or not, the state, the victim(s), society as a whole, and the entire plea-bargaining process is harmed by a rule that permits the defendant to breach that promise or direct his counsel to do it for him.

C. It Is Not Unreasonable or Deficient Performance for an Attorney to Refuse to File an Appeal on an Issue Clearly Covered by the Plea Agreement.

Petitioner focuses on a broad right to appeal numerous issues other than the issue he asked counsel to appeal—his consecutive sentences. There are, of course, several issues outside the scope of an appeal waiver that could be the subject of an appeal. But Petitioner did not ask his counsel to appeal any of those issues.

This Court in *Flores-Ortega* held that "[i]f counsel has consulted with the defendant[,] . . . counsel performs in a professionally unreasonable manner only by failing to follow the defendant's *express instructions* with respect to an appeal." 528 U.S. at 478 (emphasis added). Counsel consulted with his client numerous times both before and after sentencing. Petitioner's express instruction to counsel initially was to enter the plea. Counsel helped Petitioner do so. Petitioner never expressly asked counsel to undo that action by seeking to withdraw from the plea agreement altogether.

Where a defendant has entered into a plea agreement without an appeal waiver, filing an appeal afterward would cause no harm and conceivably might do some good. By contrast, where a defendant has waived his right to appeal, appealing an issue plainly within the scope of the appeal waiver could do no good yet could cause harm by voiding the whole agreement. *See Nunez v. United States*, 546 F.3d 450, 455 (7th Cir. 2008). Breaching the agreement by filing an appeal would risk the state reinstating the full charges against Petitioner. He would have been exposed to a

potential life sentence for possession of methamphetamine with the intent to distribute, another life sentence under the persistent violator sentencing enhancement, charges of burglary and grand theft, increased charges for felony assault, battery, and carrying a concealed weapon, and he could have been turned over to the federal prosecutor for prosecution of illegal possession of ammunition. R. 41a, 42a, 47a, 48a. Under such circumstances, "a defendant has more reason to protest if his lawyer files an appeal that jeopardizes the benefit of the bargain than to protest if the lawyer does nothing—for 'nothing' is at least harmless." *Nunez*, 546 F.3d at 455.

Common sense tells us that it is more "professionally reasonable" to refrain from filing a waived appeal that would breach the plea agreement causing serious and long-term consequences for a client than filing an appeal to which the client is not entitled due to his waiver and that he has no possible chance of winning.

III. PREJUDICE SHOULD NOT BE PRESUMED.

In *Flores-Ortega*, this Court said that to apply a "presumption of prejudice," there must be the "denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right." *Flores-Ortega*, 528 U.S. at 483. As explained above, however, defendants who enter appeal waivers do not have "a right" to appeal issues within the scope of those waivers. Nor, contrary to Petitioner's contention, is it "unfair" to require a defendant to prove on a case-by-case basis that he was prejudiced by counsel's failure to file an appeal in this context. Pet'r's Br. 29–33.

A. If a Defendant Has No Right to a Proceeding, Counsel's Actions Cannot "Lose the Proceeding" If He Fails to File a Notice of Appeal.

As this Court has recognized, "[t]he right of appeal, as we presently know it in criminal cases, is purely a creature of [state] statute." *Martinez*, 528 U.S. at 159–60 (citing *Abney v. United States*, 431 U.S. 651, 656, n.3 (1977)).[8] States therefore have the constitutional flexibility to permit waiver of the right,[9] to establish procedural ground rules for appeal (which

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[8] The Court has repeatedly stated that there is no due process requirement that the states or the federal government provide a right of appeal. *See, e.g.*, *McKane v. Durston*, 153 U.S. 684, 687 (1894); *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("[T]here is of course no constitutional right to appeal . . . ."); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) ("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all.").

[9] *See, e.g.*, Md. Code Ann., Cts. & Jud. Proc. § 12-302 (Except where a conditional plea of guilty is entered, § 12-301 does not permit an appeal from a final judgment entered following a plea of guilty in a circuit court); Kan. Stat. Ann. § 22-3602 (No appeal can be taken from a judgment upon a plea of guilty, except on jurisdictional or other grounds going to the legality of the proceedings.); La. Code Crim. Proc. Art. 881.2A(2) (defendant cannot appeal or seek review of a sentence imposed in conformity with a plea agreement); Tenn. R. App. Proc. 3 (Appeal of right lies on a plea of guilty if the defendant entered into a plea agreement but explicitly reserved the right to appeal certain issues, or if defendant seeks review of sentence and there was no plea agreement, or if the issues presented for review were not waived); *Hooks v. State*, 668 S.E.2d 718 (2008) (explaining that a defendant may waive his right to appeal); *Jones v. Commonwealth*, 795 S.E.2d 705, 714 (2017) (noting Virginia has long held that a criminal defendant can waive his right to appeal).

may be more than a "ministerial task"), and to provide for alternatives to such proceedings.[10]

Throughout this country, at both the state and federal level, courts routinely dismiss appellate petitions on the ground that the defendant waived his right to appeal and thus has no right to be heard.[11] Where a state such as Idaho allows for a waiver to remove the right to an appellate proceeding, a defendant does not "*lose*" the proceeding if an appeal is not filed.

B. It Is Not "Profoundly" Unfair to Require a Defendant to Make an Individualized Showing that His Appeal Would Have Had Merit.

Petitioner agreed not to file an appeal. Where the defendant has autonomously waived his right to appeal in exchange for negotiated benefits, it is not *always* prejudicial and "profoundly unfair" to require him to make an individualized showing why he need not abide by that agreement.

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[10] *See, e.g.*, Cal. Penal Code § 1237.5 (West) (written statement, under oath, showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceeding); Md. Rule 8-204 ("The application shall contain a concise statement of the reasons why the judgment should be reversed or modified and shall specify the errors allegedly committed by the lower court.").

[11] *See, e.g. Lee v. State*, 69 N.E.3d 955 (Ind. Ct. App. 2016) (defendant waived right to challenge sentence); *People v. Castillo*, 208 A.D.2d 944, 945, 618 N.Y.S.2d 78, 79 (1994); *Vance v. State*, 2009 WL 1450412, at *1 (Tex. Cr. App. May 26, 2009); *Cook v. State*, 14-06-00515-CR, 2006 WL 2075048, at *1 (Tex. App. July 27, 2006).

What *is* fair is that he *abides by his promise*. The state, the court, and the victims of the crime relied on that promise. Under such circumstances, nothing is "profoundly unfair" about requiring him to show that the few remaining issues he would raise in the appeal would have *some* merit. Requiring a basic individualized showing that the appeal has some merit is consistent with this Court's ineffective assistance of counsel jurisprudence. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 748 (1991), *as modified by Martinez v. Ryan*, 566 U.S. 1 (2012).

It is, however, "profoundly unfair" to deny the State and the victim the finality they bargained for when agreeing to the plea agreement. "To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring), an interest shared by the State and the victims of crime alike." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *See generally Payne v. Tennessee*, 501 U.S. 808 (1991). "Finality is essential to both the retributive and the deterrent functions of criminal law." *Calderon v. Thompson*, 523 U.S. 538, 555 (1998).

C. States Provide Defendants Adequate Avenues to Assert Claims that Fall Outside the Scope of Appeal Waivers.

More often than not, the only issues that a state will allow to survive after an appeal waiver are the interrelated issues of voluntariness of the plea and ineffective assistance of counsel. Petitioner's brief focuses on those claims, even though he did not ask his counsel to pursue them. He then asserts that it is unfair to require defendants to pursue them through state post-conviction proceedings rather than on direct appeal. Pet'r's Br. 29. Of course, that issue is not before the Court because his counsel did not decline his request to appeal on the grounds that he did not enter the plea voluntarily or that his counsel was ineffective during the course of entering the plea. Petitioner's argument also fails on its own terms. It is not unfair for states to channel those two claims to post-conviction review.

Both issues are highly factual, will not be reflected in the record, and are, usually, within the personal knowledge of only three people: the defendant, his counsel, and the prosecutor. They are therefore better reviewed in post-conviction proceedings rather than on appeal. This Court has determined that for issues where the record does not reflect the necessary facts to support the arguments, proceedings other than appeal are more effective. *See Massaro v. United States*, 538 U.S. 500, 508 (2003). Specifically, the Court found that appeals are not the best forum for assessing ineffective-assistance-of-counsel claims even if the record contained some indication of deficiencies in counsel's performance. *Id.* at 504. Thus, it allowed ineffective

assistance claims to be raised in the first instance in the trial court, which it found best suited to develop the necessary facts. *Id.* at 505. The Court also noted a growing majority of state courts, approximately thirty, were allowing such claims to be raised for the first time in post-conviction proceedings. *Id.* at 508 (citing *Commonwealth v. Grant*, 813 A.2d 726, 735 (Pa. 2002) (cataloging other states' case law)).

The remaining issues can be reviewed through other trial court motions, such as a motion to reconsider or modify sentence, motion to withdraw plea, motion for out of time appeal, motion in arrest of judgment, motions to dismiss, and motion for new trial.[12] These trial court motions are often used to raise breach, illegal sentence, and lack of jurisdiction. Thus, within state-specific parameters, defendants have other options, some of them even more effective than an appeal, to vindicate a valid claim.

In this case, for example, Petitioner could have filed a motion to reconsider or modify his sentence in the trial court. I.C.R. 35. He had 120 days to do that and no time limitation if the sentence were illegal. If he had wanted to contest the voluntariness of his plea, he

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[12] *See, e.g.*, Ga. Code Ann. § 17-9-60 (motion in arrest of judgment); Kan. Stat. Ann. § 22-3504 correct sentence); Kan. Stat. Ann. § 22-3502 (arrest of judgment); La. Code Crim. Proc. art. 851 (new trial); La. Code Crim. P. art. 859 (arrest of judgment); Md. Rule 4-332 (writ of actual innocence); Md. Code Ann., Crim. Proc. § 8-401 (failure to seek an appeal in a criminal case may not be construed as a waiver of the right to file a petition for writ of error *coram nobis*); Tenn. R. Crim. P. 35 (reduction of sentence); Tenn. R. Crim. P. 34 (arrest of judgment); Md. Rule 4-345 (sentencing; revisory power of court); Va. Code § Ann. 19.2-296 (motion to withdraw plea).

could have filed a motion to withdraw the plea. Petitioner therefore had the ability to attempt to withdraw his plea if he was not happy with the bargain he made. *See McKinney v. State*, 396 P.3d 1168, 1177–80 (Id. 2017); *State v. Green*, 943 P.2d 929, 931–32 (Id. 1997). He did not attempt to do so because he wanted to have his cake and eat it too. In the absence of an attempt to withdraw his entire plea, he should be bound by it. He should not be allowed to effectuate untimely partial withdrawal by ordering counsel to violate the agreement.

IV. APPEAL WAIVERS BENEFIT MULTIPLE PARTIES, AND SO A RULE DIMINISHING THEIR VALUE WOULD NEGATIVELY AFFECT THE CRIMINAL JUSTICE SYSTEM.

A defendant's ability to bargain away his right to appeal has been approved by all federal circuits and incorporated into the law of all of the states.[13] At least at the federal level, appeal waivers are an additional bargained-for provision in two-thirds of the cases

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[13] *See, e.g., In re Sealed Case*, 283 F.3d 349, 355 (D.C. Cir. 2002); *United States v. Teeter*, 257 F.3d 14, 21–26 (1st Cir. 2001); *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001); *United States v. Hernandez*, 134 F.3d 1435, 1437 (10th Cir. 1998); *United States v. Ashe*, 47 F.3d 770, 775–76 (6th Cir. 1995); *United States v. Schmidt*, 47 F.3d 188, 192 (7th Cir. 1995); *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993); *United States v. Salcido-Contreras*, 990 F.2d 51, 51 (2d Cir. 1993); *United States v. Melancon*, 972 F.2d 566, 567–68 (5th Cir. 1992); *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992), *overruled on other grounds by United States v. Andis*, 333 F.3d 886 (8th Cir. 2003); *United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990); *United States v. Navarro-Botello*, 912 F.2d 318, 322 (9th Cir. 1990).

settled by plea agreements. *See Appeal Waivers*, 55 Duke L. J. at 212.

Such waivers, which guarantee finality in the proceedings for the State, the defendant, the victim, and the system, have great value to all involved. The principle of finality is "essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). Additionally, "it provides peace of mind to a wrongdoer's victims; it promotes public confidence in the justice system; it conserves limited public resources; and it ensures the clarity of legal rights and statuses." *Buck v. Davis,* 137 S. Ct. 759, 785 (2017) (Thomas, J., dissenting). And, as mentioned above, defendants benefit from the additional concessions offered by the prosecutor and an improved chance of approval by the court.

If prosecutors cannot obtain the finality that appeal waivers provide, they will far less often seek to include them in plea agreements. That makes it less likely victims and judges will agree to plea agreements. And if prosecutors cannot guarantee the reduction in workload or other specific benefits that such waivers bring, they are more likely to go to trial or hold out for stiffer sentences, both of which will burden defendants, the judicial system, and the prison system.

CONCLUSION

For the foregoing reasons, and those described by Respondent, this Court should affirm the Idaho Supreme Court.

Respectfully submitted,

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